Lee Bak Chui & Ors v Kerajaan Negeri Kedah Darul Aman & Ors

HIGH COURT (ALOR SETAR) — JUDICIAL REVIEW APPLICATION NOS KA-25–1–02 OF 2023, KA-25–3–03 OF 2023, KA-25–4–03 OF 2023, KA-25–5–03 OF 2023, KA-25–11–04 OF 2023 AND KA-25–16–05 OF 2023
MAHAZAN MAT TAIB J
25 JULY 2024

Administrative Law — Judicial review — Application for — Decision by the state government to not renewing pool betting business license ('the said decision') — Whether the said decision was justiciable — Whether the said decision tainted with illegality — Whether the said decision was irrational and unreasonable — Whether there was discrimination — Whether mandamus order should be granted — Federal Constitution art 8, 74 & Ninth Schedule, List I, item 4 — Local Government Act 1976 ss 2 — Pool Betting Act 1967 s 5

Local Government — State Government — Business of betting and lotteries — State Government decided to not renew and/or issue business premises licence to pool betting businesses — Whether betting and lotteries fall under purview of Federal Government or State Government — Whether State Government's decision consistent with Federal Constitution — Whether State Government could exercise Executive authority on matters pertaining to gambling — Federal Constitution, arts 74, 80 & Ninth Schedule, List I, item 4(1) of Federal List

The applicants were the pool betting agents and aggrieved by the decision of the first respondent, the State Government of Kedah on the decision that the premise licenses for the activities of the gambling business would not be renewed in the State of Kedah ('the said decision'). All applicants then received Municipal Letters from the respective Municipal Councils stated that it was agreed that the Ministry of Finance to not consider the renewal of gambling licenses for the State of Kedah for the year 2023 since the license falls within the purview of the Ministry of Finance and it was agreed that the Kedah State local authority and police should take strict enforcement action should there be any license holders still in operation after 31 December 2022. The applicants after been informed of the said decision were also informed that legal action would be taken if business was still carried out on the premises. The applicants submitted that the said decision was illegal, unreasonable, irrational and the respondents had breached the applicants' legitimate expectation as provided under written law that as long as the pool betting agents were licensed under s 5 of the Pool Betting Act 1967, the applicants would be able to peacefully carry

on their trade and business. The applicants alleged that the respondents had acted more than their authority. Thus, the applicants filed this application to review the said decision.

Held, allowing the application:

(1) The court was of the view that where the policy or action of the Executive is inconsistent with the Federal Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power, the court is duty bound to interfere. Based on the facts and circumstances of the present case, the court could interfere on the grounds of illegality and irrationality if the said decision was inconsistent with the Federal Constitution and in any manner irrational (see paras 27–28).

(2) The said decision was made in contrary to art 80(1) read with art 74 and item 4(1) of the Federal List of the Federal Constitution. Even though the first respondent had the Executive authority on the matter of local authority in relation to the premise license for gambling according to art 80 read together with art 74 and Item 4 of the State List of the Federal Constitution, the first respondent's decision to cease the renewal of premise license for gambling in effect rendered item 4(1) of the Federal List on betting and lotteries meaningless as it had been of the matter of local authority to ban betting and lotteries under the subject matter of premise license for gambling. Therefore, the court was duty bound to interfere, and the application for judicial review ought to be granted on the ground of illegality (see paras 43 & 47).

(3) The first respondent failed to take into account that the said decision caused loss in livelihood, income and/or business of the applicants, and it also failed to take into account that it brought direct impact to the applicants who were unable to collect, carry out or operate pool betting through their agents. The first respondent had not directed himself properly in law taking into consideration the matters which he was bound to consider, whereby it had acted unreasonably and failed to take into account relevant consideration in reaching the said decision by failing to understand that betting and lotteries were matters within item 4(1) of the Federal List and not under the State List. Thus, the application for judicial review ought also to be granted upon the grounds of irrationality (see paras 58 & 60–61).

(4) The court was of the view the applicants were not treated unequally by the first respondent where it was clearly stated in the said decision itself that all the premise licenses for the number forecast operators and association clubs for gambling in the State of Kedah were discontinued. Therefore, it undoubtedly shows that such decision to all persons in the

same class, and thus there was no room for discrimination against the applicants, let alone unfair discrimination (see para 72).

(5) For the judicial review in relation to the Executive decision, the relief would be to quash the decision by way of certiorari to give the Executive another opportunity to reconsider the decision according to law as it was not permissible to substitute the Executive decision by an order of court. However, an order of mandamus may be granted when constant disobedience was made, unless it was related to a specific legal right or constitutional right where an order for mandamus could be issued in the first instance. As a result, an order of mandamus ought not to be granted in relation to the said decision as at this juncture it was still premature and not permissible to substitution such decision by an order of court. The more appropriate order would thus be quashing the said decision by way of certiorari to quash the decision (see paras 86–87 & 97).

[Bahasa Malaysia summary

Pemohon-pemohon adalah ejen pertaruhan pool dan terkilan dengan keputusan responden pertama, Kerajaan Negeri Kedah untuk tidak memperbaharui lesen premis bagi aktiviti perniagaan perjudian di Negeri Kedah ('keputusan tersebut'). Semua pemohon kemudiannya menerima Surat Perbandaran daripada Majlis Perbandaran masing-masing menyatakan bahawa Kementerian Kewangan telah mempersetujui untuk tidak mempertimbangkan pembaharuan lesen perjudian bagi Negeri Kedah bagi tahun 2023 kerana lesen tersebut berada di bawah bidang kuasa Kementerian Kewangan. Juga telah dipersetujui bahawa pihak berkuasa tempatan dan polis Negeri Kedah perlu mengambil tindakan penguatkuasaan yang tegas sekiranya terdapat mana-mana pemegang lesen yang masih beroperasi selepas 31 Disember 2022. Pemohon-pemohon selepas dimaklumkan mengenai keputusan tersebut juga dimaklumkan bahawa tindakan undang-undang akan diambil sekiranya perniagaan masih dijalankan di premis tersebut. Pemohon-pemohon berhujah bahawa keputusan tersebut adalah menyalahi undang-undang, tidak munasabah, tidak rasional dan responden-responden telah melanggar jangkaan sah pemohon seperti yang diperuntukkan di bawah undang-undang bertulis bahawa selagi ejen pertaruhan pool dilesenkan di bawah s 5 Akta Pertaruhan Pool 1967, pemohon-pemohon boleh menjalankan perniagaan mereka tanpa gangguan. Pemohon-pemohon menghujahkan bahawa responden-responden telah bertindak lebih daripada kuasa mereka. Oleh itu, pemohon-pemohonan memfailkan permohonan ini untuk menyemak keputusan tersebut.

Diputuskan, membenarkan permohonan:

(1) Mahkamah berpendapat bahawa apabila polisi atau tindakan Eksekutif tidak konsisten dengan Perlembagaan Persekutuan dan undang-undang atau dalam apa jua cara, tidak rasional atau terdapat unsur-unsur mala

fide dan penyalahgunaan kuasa, mahkamah bertanggungjawab untuk campur tangan di atas keputusan tersebut. Berdasarkan fakta dan keadaan kes ini, mahkamah boleh campur tangan atas alasan menyalahi undang-undang dan tidak rasional sekiranya keputusan tersebut tidak konsisten dengan Perlembagaan Persekutuan dan dalam apa jua cara yang tidak rasional (lihat perenggan 27–28).

(2) Keputusan tersebut dibuat bertentangan dengan perkara 80(1) yang dibaca bersama perkara 74 dan perkara 4(1) Senarai Persekutuan Perlembagaan Persekutuan. Walaupun responden pertama mempunyai kuasa Eksekutif mengenai perkara pihak berkuasa tempatan berhubung dengan lesen premis untuk perjudian mengikut perkara 80 yang dibaca bersama dengan perkara 74 dan Perkara 4 Senarai Negeri Perlembagaan Persekutuan, keputusan responden pertama untuk menghentikan pembaharuan lesen premis untuk perjudian yang berkuat kuasa menjadikan perkara 4(1) Senarai Persekutuan mengenai pertaruhan dan loteri sia-sia kerana kuasa untuk mengharamkan pertaruhan dan loteri berada di bawah pihak berkuasa tempatan yang mengawal lesen premis untuk perjudian. Oleh itu, mahkamah bertanggungjawab untuk campur tangan untuk keputusan tersebut dan permohonan semakan kehakiman harus dibenarkan atas alasan menyalahi undang-undang (lihat perenggan 43 & 47).

(3) Responden pertama gagal mengambil kira bahawa keputusan tersebut menyebabkan kerugian sumber pencarian, pendapatan dan/atau perniagaan pemohon, dan mereka juga gagal mengambil kira bahawa ianya membawa kesan langsung kepada pemohon-pemohon yang tidak dapat mengumpul, menjalankan atau mengendalikan pertaruhan pool melalui ejen mereka. Responden pertama tidak berpandukan undang-undang dan bertindak tidak munasabah dan gagal mengambil kira pertimbangan yang relevan dalam mencapai keputusan tersebut dengan gagal memahami bahawa pertaruhan dan loteri adalah perkara dalam perkara 4(1) Senarai Persekutuan dan bukannya di bawah Senarai Negeri. Oleh itu, permohonan semakan kehakiman juga harus dibenarkan atas alasan tidak rasional (lihat perenggan 58 & 60–61).

(4) Mahkamah berpendapat bahawa pemohon tidak dilayan secara tidak sama rata oleh responden pertama di mana ianya dinyatakan dengan jelas dalam keputusan tersebut terpakai untuk semua lesen premis bagi pengendali nombor ramalan dan kelab persatuan perjudian di Negeri Kedah. Oleh itu, jelaslah ianya menunjukkan bahawa keputusan sedemikian terpakai kepada semua orang dalam kelas yang sama dan dengan itu tiada diskriminasi terhadap pemohon, apatah lagi diskriminasi yang tidak adil (lihat perenggan 72).

(5) Untuk semakan kehakiman mengenai dengan keputusan Eksekutif, cara yang sesuai untuk membatalkan keputusan itu dengan cara certiorari

untuk memberi peluang kepada Eksekutif untuk mempertimbangkan semula keputusan menurut undang-undang kerana mahkamah tidak boleh menggantikan keputusan Eksekutif dengan perintah mahkamah. Walau bagaimanapun, perintah mandamus boleh diberikan sekiranya terdapat ketidakpatuhan berterusan atau berkaitan dengan hak undang-undang tertentu atau hak perlembagaan di mana perintah untuk mandamus boleh dikeluarkan pada mulanya. Oleh itu, perintah mandamus tidak boleh dibenarkan berhubung dengan keputusan tersebut kerana pada ketika ini ianya masih terlalu awal dan tidak dibenarkan untuk menggantikan keputusan tersebut dengan perintah mahkamah. Oleh itu, perintah yang lebih sesuai ialah membatalkan keputusan tersebut dengan cara certiorari untuk membatalkan keputusan itu (lihat perenggan 86–87 & 97).]

Cases referred to

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681, FC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Dominic Lau Hoe Chai v Maszlee bin Malik & Ors [2020] 8 MLJ 50, HC (distd)

Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (folld)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (folld)

Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Daya Leasing Sdn Bhd [2005] 4 MLJ 138; [2005] 2 CLJ 449, CA (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94, FC (refd)

Lai Hen Beng v PP [2024] 1 MLJ 225, FC (refd)

Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (folld)

Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal [2016] 4 MLJ 621, CA (refd)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356 (refd)

Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Perdagangan Semenanjung Malaysia & Anor [2012] 6 MLJ 18, CA (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351, SC (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
Nestle Products Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor [2013] 8 CLJ 586, HC (refd)
Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832, HC (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)
Shergill and others v Khaira and others [2015] AC 359, SC (refd)
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128, HC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)
Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812, FC (refd)

Legislation referred to

Local Government Act 1976 ss 2, 107
Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000
Federal Capital Act 1960 s 3
Federal Constitution arts 8, 8(1), (2), 12(3), 74, 75, 80(1), Eighth Schedule, Ninth Schedule, List I, item 4, 4(f), List II, item 4(1)
Local Government Act 1976 ss 2, 107
Pool Betting Act 1967 s 5

Brian Chia Wee Ye (with Chang Jin Yee, Eolanda Yeo and Nureliyana) (Cheang & Arif)) for the applicants.
Nik Azhan Hakim bin Nik Mahmood (with Norhayati bt Ibrahim and Nurul Liyana bt Mohammad Nasir) (Kedah State Legal Advisor's Office) for the respondents.

Mahazan Mat Taib H:

INTRODUCTION

[1] Under the order of this court dated 6 July 2023, these six applications for judicial review ('suits') were heard together before this court. Leave to commence judicial review was later allowed by this court on 17 October 2023.

[2] The suits relate to:

(a) the decision of the first and second respondent to not renew and/or issue business premises licence to the applicants who run pool betting businesses in Kedah; and

(b) the act of the third and fourth respondents who upon the first and second respondent's direction, refused to renew and/or issue business premises licenses to the applicants who run pool betting businesses in Kedah.

[3] The prayers the applicants seek in these six suits are as follows:

(a) a declaration that the first respondent had acted illegally and/or irrationally in:

(i) deciding pursuant to the EXCO's decision on 8 December 2021 ('first respondent's decision') to cease the renewal of premises licenses for pool betting in the State of Kedah effective from 1 January 2023; and/or

(ii) causing the Municipal Councils to issue the notice and/or letters ('Municipal letters') to inform the applicants that their respective premises licenses for pool betting will cease to be renewed effective from 1 January 2023.

(b) a declaration that the first respondent's decision is ultra vires to the Federal Constitution and/or unconstitutional as it is inconsistent with and in breach of, inter alia, arts 8, 73, 74, 75, Eighth Schedule and item 4(1) and List I of the Ninth Schedule and are therefore null and void;

(c) an order for certiorari to move this honourable court to quash the first respondent's decision;

(d) an order for mandamus directing the first respondent to forthwith direct all of the local authorities in the state of Kedah to renew all applications for gambling premises licenses for the year 2023 and onwards;

(e) an order for damages for losses suffered by the applicants to be assessed by the deputy registrar/senior assistant registrar and thereafter to be paid by the first respondent to the applicants; and/or

(f) any other orders or reliefs as deemed necessary and/or just and/or appropriate to be given by this honourable court.

[4] Upon hearing the application, this court has decided that judicial review ought to be granted on the grounds of illegality and irrationality, for the following reasons:

(a) on the facts and circumstances of the present case, the court may interfere on the grounds of illegality and irrationality if the first respondent's decision is inconsistent with the Federal Constitution and in any manner irrational;

(b) the first respondent's decision to cease the renewal of premise licence for gambling is inconsistent with art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution.

(c) the matter in issue had been extended to the matter of local authority banning betting and lotteries under the subject matter of premise licence for gambling. This would then cause apparent conflict or overlap between the entry of item 4 of the State List and the entry of item 4(1) of the Federal List, where the Court should attempt to reconcile them by adopting a harmonious construction.

(d) undertaking the exercise of harmonious construction, it may only allow the matter of local authority in relation to the premise licence for gambling, but not to the extent of banning betting and lotteries. Otherwise, it would be including matter to override or render meaningless the entry in item 4(1) of the Federal List.

(e) as a result, the matter of local authority to ban betting and lotteries under the subject matter of premise licence for gambling has no rational connection to item 4 of the State List, instead, it has the effect of overriding and rendering meaningless the entry of betting and lotteries in item 4(1) of the Federal List.

(f) the court is duty bound to interfere as the first respondent's decision is inconsistent with the Federal Constitution, where the first respondent had acted illegally and/or ultra vires of its authority when it arrived and implemented the first respondent's decision and failed to understand, inter alia, that:

(i) pool betting and lotteries are matters in item 4(1) of the Federal List and not under the State List. Implementation of the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional for being inconsistent with art 80 read together with art 74 and item 4(1) of the Federal List of the Federal Constitution;

(ii) the first respondent had erred in law in arriving at the first respondent's decision in disregard of art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution that pool betting and lotteries are matters under the Federal List and not State List; and

(iii) the first respondent had not directed himself properly in law taking into consideration the matters which he is bound to consider,

whereby it had acted unreasonably and failed to take into account relevant consideration in reaching the first respondent's decision by failing to understand that betting and lotteries are matters within item 4(f) of the Federal List and not under the State List.

[5] The respondents then filed the notice of appeal. This is the full grounds of judgment for the decision.

FACTS OF CASE

[6] The applicants are pool betting agents, pool betting companies or principal officers of pool betting companies.

[7] The first respondent is the government of the State of Kedah comprised of the Second Respondent Menteri Besar Kedah, and the members of the Kedah State Executive Council. Meanwhile, the Third Respondent is the local authority under the meaning of s 2 of the Local Government Act 1976 (Act 171) which is comprised of the fourth respondent and the members of the council.

[8] On 14 November 2021, the second respondent made a statement that the first respondent had decided that the premise licences for the activities of the gambling business would not be renewed in the State of Kedah.

[9] Consequently, the first respondent, comprised of the Second Respondent, Menteri Besar Kedah, and the members of the Kedah State Executive Council ('EXCO') sitting on 8 December 2021 had decided via No 7(F) 423/2021 paper that:

> Mengambil maklum bahawa Kementerian Kewangan Malaysia telah meluluskan lesen perjudian kepada 5 Kelab Persatuan dan 45 Ejen Agensi Nombor Ramalan (NFO) di negeri Kedah bermula 1 Januari 2022 sehingga 31 Disember 2022.
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> (a) Bersetuju supaya semua lesen premis perjudian NFO dan Kelab Persatuan di Negeri Kedah diberhentikan sehingga 31 Disember 2022 sabagaimana kelulusan oleh MOF.
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> (b) Bersetuju supaya Kementerian Kewangan Malaysia tidak lagi mempertimbangkan pembaharuan lesen perjudian di Negeri Kedah pada 2023 memandangkan permohonan lesen ini di bawah bidang kuasa kementerian.
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> (c) Bersetuju sekiranya terdapat pengusaha lesen yang masih beroperasi selepas 31 Disember 2022 (tarikh tamat lesen), PBT Negeri Kedah bersama PDRM hendaklah menjalankan tindakan penguatkuasaan yang tegas.

[10] All the applicants then received Municipal letters from the respective Municipal Councils in which the commonality among the Municipal letters is their reference to the 'Majlis Mesyuarat Kerajaan Negeri Kedah Darul Aman' on 8 December 2021.

[11] The Municipal letters, among others, stated that it was agreed that the Ministry of Finance should not consider the renewal of gambling licenses for the State of Kedah for the year 2023 since the license falls within the purview of the Ministry of Finance, and it was agreed that the Kedah State local authority and police should take strict enforcement action should there be any license holders still in operation after 31 December 2022. The Municipal letters to all applicants had similar contents.

[12] The applicants having been informed of the first respondent's decision, were also informed that legal action would be taken if business was still carried out on the premises, as follows:

> 3. Sehubungan itu, dengan penerimaan surat ini, lesen di alamat tersebut telah DIBATALKAN, TINDAKAN UNDANG-UNDANG akan diambil sekiranya pihak Majlis mendapati tuan/puan masih lag! menjalankan perniagaan di premis tersebut.

[13] As a result of the first respondent's decision to not renew and/or issue business premises licences to the applicants who run pool betting businesses in Kedah, the respective Municipal Councils applicable to the applicants had refused to renew and/or issue business premises licenses to the applicants who run pool betting businesses in Kedah.

[14] The applicants therefore submitted that this decision and/or action is illegal, unreasonable and irrational, and the Respondents have breached the applicants' legitimate expectation as provided under written law that as long as the pool betting agents are licensed under s 5 of the Pool Betting Act 1967 (Revised 2018) (Act 809), the applicants would be able to peacefully carry on their trade and business. The applicants alleged that the respondents have acted more than their authority.

[15] Aggrieved by the first respondent's decision, issuance of the Municipal letters and the refusal to renew the premise licence, the applicants filed an application for leave to commence judicial review against the respondents which was allowed by this court, hence all these six suits heard, accordingly.

[16] The grounds for the judicial review against the first respondent were concisely summarised as follows:

(a) irrationality and unreasonableness:

The first respondent had acted unreasonably and failed to take into account relevant considerations in reaching the first respondent's decision by:

(i) failing to understand that pool betting and lotteries are matters within item 4(1) of List I in the Ninth Schedule to the Federal Constitution and not under List II in the Ninth Schedule to the Federal Constitution. Implementation of the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional for being inconsistent with, inter alia, arts 74 and 75 of the Federal Constitution;

(ii) arriving at the first respondent's decision and issuing the Municipal letters and the action of not renewing and revoking the premise licences of the applicants were intended to ban the business of pool betting in the State of Kedah. It was done mala fide as the Respondents were aware that the jurisdiction regarding the business of pool betting and lotteries are matters within the Federal List and not the State List;

(iii) failing to take into account that the first respondent's decision causes loss in livelihood, income and/or business of the applicants;

(iv) failing to take into account that the first respondent's decision brings direct impact to the applicants who are unable to collect, carry out or operate pool betting through their agents, and/or other agents in the State of Kedah. Therefore, this will have a paralysing effect on the staff and/or employees of the applicants, especially those who reside in the State of Kedah;

(v) failing to take into account that the State of Kedah is a State multiracial community, and implementation of banning pool betting which was participated by non-Muslims is an unreasonable infringement of the rights of non-Muslims in the State of Kedah for the collection, operation or promotion of pool betting or taking part therein. Therefore, this is inconsistent with art 8 of the Federal Constitution;

(vi) the first respondent's decision to ban pool betting in the State of Kedah by cancelling the renewal of the premise licence for the activities of pool betting is unreasonable, inconsistent with common sense, and unfair discrimination against the non-Muslims in the State of Kedah has been deprived of collecting, promoting, operating or participating in pool betting, while it is allowed in other States in Malaysia. This is a violation of art 8 of the Federal Constitution; and

(vii) the implementation by the first respondent and/or the second

respondent in enforcing the first respondent's decision is unreasonable and irrational.

(b) illegality:

The first respondent had acted illegally and/or ultra vires of its authority when it arrived and implemented the first respondent's decision and failed to understand, inter alia, that:

(i) pool betting and lotteries are matters under item 4(1) of the Federal List and not under List II of the State List. Implementation of the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional for being inconsistent with, inter alia, arts 74 and 75 of the Federal Constitution;

(ii) implementation of the first respondent's decision is an unreasonable infringement of the rights of non-Muslims in the State of Kedah for the collection, operation or promotion of pool betting or taking part therein. Therefore, this is inconsistent with art 8 of the Federal Constitution;

(iii) the first and second respondents had erred in law in arriving at the first respondent's decision disregarding arts 74 and 75 of the Federal Constitution that pool betting and lotteries are matters under the Federal List and not the State List;

(iv) the first and second respondents had improperly delegated themselves with the powers to implement the first respondent's decision when the powers to make laws and/or regulations relating to pool betting and lotteries are given to Parliament and not the Second Respondent and/or the first respondent and/or the Kedah State Legislative Assembly;

(v) there is no reasonable and/or legal basis for the first and second respondent to implement the first respondent's decision.

(c) procedural impropriety (legitimate expectation):

The act of the respondents in making the first respondent's decision, issuing the Municipal letters and the refusal to renew the premise licence for the applicants is in breach of the legitimate expectation of the applicants upon the following grounds:

(i) the applicants had operated the business of pool betting mostly for more than ten years, and one of them had been in the business since 1987;

(ii) the third and fourth respondent had never revoked the premise licences and always renewed the premise licence without failure for the business of pool betting every year;

(iii) the applicants had the relevant and valid licence from the Ministry of Finance under s 5 of Act 809 for the collection, operation or promotion of pool betting at their premise of business;

(iv) every year, the applicant had paid for the required fee to the Ministry of Finance including the fee for licences in 2023 for the collection, operation or promotion of pool betting;

(v) since the applicants had an interest in the pool betting business in the State of Kedah, the respondents should have heard from the applicants before making the first respondent's decision, issuing the Municipal letters, and refusing to renew and revoke the premises licence for the premises of the business; and

(vi) the premise licence for the business of pool betting is still listed in the business that is allowed under the guidelines for business premises licence.

ANALYSIS BY THE COURT

[17] In the present application for judicial review, the applicants have placed reliance upon three grounds of irrationality and unreasonableness, illegality and procedural impropriety, which have long been the grounds for judicial review as accepted by our courts.

[18] In the case of *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351 (SC) ('Persatuan Aliran Kesedaran Negara'), the Supreme Court held as follows:

> In the course of his submission, counsel for Aliran cited several cases in support but we find it sufficient to refer to only one case which fairly sums up the position of judicial review of administrative actions — *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 where Lord Diplock had this to say at pp 410 and 411:
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> > Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about *one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.*
> >
> > By *'illegality'* as a ground for judicial review, I mean that the *decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it* Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By *'irrationality',* I mean what can by now be succinctly referred to as *'Wednesbury unreasonableness'* (*Associated Provincial Picture Houses Ltd v Wednesbury Corp*

[1948] 1 KB 223). It applies to *a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*

I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also *failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.*

In the same case, Lord Roskill at p 414 states:

Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today, it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described — by no means critically — as an upsurge of judicial activism. Historically, the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far, this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, *Wednesbury* principles (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1984] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case, as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the

relationship of those involved on either side before the decision was taken.

My noble and learned friend, Lord Diplock, in his speech, has devised a new nomenclature for each of these three grounds, calling them respectively 'illegality', 'irrationality' and 'procedural impropriety' — words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground. (Emphasis added.)

[19] As demonstrated above, the Supreme Court referred to the landmark decision of the House of Lords in *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 (HL) ('CCSU') with approval for the position of judicial review of administrative actions upon the three grounds of illegality, irrationality and procedural impropriety.

Justiciability

[20] However, at this juncture, there is a more pertinent issue for determination, which is whether the first respondent's decision is justiciable. The first respondent in their written submission argued that the first respondent's decision is a policy decision of the nature of administration of the first respondent, and therefore it is nonjusticiable and not amenable to judicial review by the court.

[21] In the authoritative text, *De Smith's Judicial Review* (8th Ed, Sweet & Maxwell, 2018), the subject matter of justiciability in the limits of judicial review is explained in length as follows:

Judicial review has developed to the point where it is possible to say that no power — whether statutory, common law or under the prerogative — is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of public power, its scope and its substance. As we shall see, even when discretionary powers are engaged, they are not immune from judicial review, Discretion has been described as the 'hole in the [legal] doughnut] but that hole is not automatically a lawless void. Nevertheless, there are certain decisions which courts cannot or should not easily engage. Courts are limited (a) by their constitutional role and (b) by their institutional capacity.

Limitations inherent in the courts' constitutional role

The principle of the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. It is not for judges to weigh utilitarian calculations of social, economic or political preference. Courts will not, therefore, make decisions on: whether site A or B is suitable for the location of a new airport; whether the United Kingdom should engage in a programme of nuclear disarmament; whether there should be investment in a significant nuclear power programme; whether the programme to produce Trident nuclear warheads should be abandoned; whether there should be further regulation on the environmental effects of crop-spraying; or

whether the British invasion of Iraq in 2003 was justified in international law.

Speaking extrajudicially shortly before becoming a member of the Supreme Court, Lord Sumption argued that the 'tendency of the courts to intervene in the making of 'macro policy' has become more pronounced in recent years', with 'the whole process ... unduly influenced by the degree of judicial aversion to the policy in question' — an assessment rejected as conflating government and legislature 'to suggest that both ought to be equally immunised by the democratic credentials from judicial oversight'.

The constitutional status of the judiciary should not, however, excuse the courts from any scrutiny of policy decisions. Courts are able, and indeed obliged, to require that decisions, even in the realm of 'high policy' are within the scope of the relevant legal power or duty, and arrived at by the legal standards of procedural fairness. The courts display reserve in impinging upon the substance of policy decisions, but even here they may legitimately intervene if the decision is devoid of reason and not properly justified. Judges always possess the capacity to probe the evidence and assess whether the reasons and motives for decisions are rationally related to their aims ...

Limitations inherent in the courts' institutional capacity

In respect of the institutional capacity of the courts, *there are some decisions which they are ill-equipped to review — those which are not ideally justiciable on in other words, 'not amenable to the judicial process'*, or indeed those which are better above to be determined by other bodies, including Parliament

...

Matters in relation to which the court lacks expertise

A second institutional limitation of the courts is lack of relative expertise. Particularly as the review of fact, or the merits of a decision, is not routinely permitted in judicial review, there are some matters which are best resolved by those with specialist knowledge. Connected with the issue of expertise is that of risk-assessment.

National security was often said to be an area in which the courts should not readily intervene, not merely because the executive possess prime constitutional responsibility in this area, but because they may be best placed to assess, through their network of informers, the risk of the dangers involved. *However, here too the court will no longer unguestioningly accept the say-so of the executive or other experts, and will properly intervene if the decision is based on a material mistake of fact, is incompatible with Convention rights contrary to the Human Rights Act 1998, oris otherwise illegal or irrational, oris affected by procedural impropriety. (Emphasis added.)*

[22] In the case of *Shergill and others v Khaira and others* [2015] AC 359, the United Kingdom Supreme Court provided the categories of cases which are non-justiciable as follows:

41. There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer immunity from liability on certain persons in respect of certain

acts. Some, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. *Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter Such cases generally fall into one of two categories.*

42. The first category comprises cases *where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers.* Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 935–937 is the leading case in this category, although the boundaries of the category of 'transactions' of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago. The second is based on the constitutional limits of the court's competence as against that of *Parliament: Prebble v Television New Zealand Ltd* [1995] 1 AC 321. *The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable.* Where the nonjusticiable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al Fayed* [2001] 1 AC 395.

43. The basis of the second category of non-justiciable cases is quite different It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes; transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be nonjusticiable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no 'domestic foothold'. But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: *R (Abbasi) v Secretary of State for*

Foreign and Commonwealth Affairs [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter ... (Emphasis added.)

[23] In the local context, the Federal Court had laid down a brief understanding of justiciability in the case of *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812 (FC) in the following terms:

[18] *Justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. If the court has no authority to adjudicate over the dispute, then it is non-justiciable.* This issue is recognised by courts and currently inherent in the nature of the judicial process (*Buttes Gas & Oil Co v Hammer* [1982] AC 888; *Kuwait Airways Corporation v Iraqi Airways Co* [2002] UKHL 19) ... (Emphasis added.)

[24] Prior to this, the High Court had in the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128 (HC) sought to explain in great detail the concept of justiciability as follows:

THE CONCEPT OF JUSTICIABILITY

[8] Justiciability relates to the sixth ground stated above — whether judicial review is an appropriate procedure. It can be subsumed even undergrounds (v) and (iv). The issue can also be stated as whether the subject matter is 'amenable to judicial process', a phrase which appears in the House of Lords decision in Council of *Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] 1 AC 374, per Lord RoskiL *Generally, an issue is regarded as nonjusticiable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.*

[9] The learned authors of *Duma Das Basu's Human Rights in Constitutional Law* (2nd Ed, Reprint 2005) observe with deserving scholarship as follows:

Limits of Judicial Review of Executive Acts

Even where it appears prima facie that some fundamental right has been violated by an Executive Act the Court cannot interfere with that act on the ground of unconstitutionality because of general principles relating to the limits of the judicial method and the rule of the judiciary, and the lack of satisfactory criteria for a judicial determination of certain questions.

Non-justiciable Issues

In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a Court of Law, because the issue involved is not justiciable.

... The most prominent amongst nonjusticiable issues are those which are known

in the U.S.A. as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).

[10] The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, We fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, We Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand' (at p 121).

[11] A good definition of 'justiciability' can also be found in Chris Finn, The Concept of Justiciability' in *Administrative Law in Groves & Lee, Australian Administrative Law* (2007):

The term justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'nonjusticiable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role, (at p 143). (Emphasis added.)

[25] Subsequently, certain passages above were also later adopted with approval by the Federal Court in the case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 (FC) as follows:

[48] It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, inter alia, its justiciability. *'Justiciability'concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.*

[49] The issue of justiciability in an application for leave for judicial review was considered in great detail by Mohamad Ariff Md Yusuf J (as he then was) in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128:

Non-justiciable Issues

In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a Court of Law, because the issue involved is not justiciable.

... The most prominent amongst non-justiciable issues are those which are known in the USA as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).

The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, 'the Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand'(atp 121).

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[50] There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. *Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts.* One such instance is the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) (the GCHQ case'). (Emphasis added.)

[26] In the landmark decision of *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 (FC) ('Dr Michael Jeyakumar'), the Federal Court had in no uncertain term opined that the policy of the executive is generally non-amenable to judicial review and it is exclusively within the domain of the executive as follows:

> [16] We have no hesitation in accepting that the executive's discretion, whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case (see *R Rama Chandran, Kumpulan Perangsang Bhd and Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625. It was generally held in those cases that not every decision of the executive could be subjected to judicial review.
>
> [17] In the instant case, the Court of Appeal in dealing with the issue held that:
>
> > *In our view, and as implied in the notice of motion, there can be no doubt that the approval and disbursement of the fund involves an exercise of discretion. The DG and/or the director must evaluate the applications for the allocations. These applications can only be decided by the DG and/or the director in line with policy considerations and management prerogatives. The factual background did show that*

the appellants had approved the respondent's application amounting to RM1.72m, while other applications are being given consideration. The director has given practical suggestions to the respondent to channel relevant applications to relevant government agencies. In the process of evaluation, the DG and/or the director must comprehensively balance and safeguard the disbursement of the allocation, consistent with government policy and guidelines. Our courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the director's evaluation.

[18] We are in complete agreement with the above view. We would like to add that the disbursement of the Special Constituency Allocation is a policy matter which is not within the purview of the courts. It is our view that *the courts are in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the executive. We have to take cognisance of the fact that government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adeguacy of a particular policy.*

[19] In this regard, we would quote the relevant passages of the renown authors, MP Jain and SN Jain from their book entitled *Principles of Administrative Law* (6th Ed), atp 1069:

It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitution, statutory or any provision of law. When the government forms its policy it is based on a number of circumstance on facts, law, including constraints based on these resources. It is also based on its expert opinion, it would be dangerous if court is asked to test the utility, beneficiate effect of the policy or its appraisal based on facts set out on affidavits. *The court would dissuade itself from entering into this realm which belongs to the executive* (see *State of Punjab v Ram Lubhaya Bagga, AIR* [1998] SC 1703), On matters affecting policy and requiring technical expertise, the court would leave the matter for decision of those who are qualified to address this issue. Unless the policy or action is inconsistent with the constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters (see *Federation of Railway Officers Assn v UOI* AIR [2003] SC 1344).

[20] In the present case, the second respondent had clearly explained, why he decided the way he did with regard to the distribution of the Special Constituency Allocation for the Sungai Siput constituency. *Clearly, what was decided by the second respondent hinged on matters relating to policy and thus we would dissuade ourselves from entering into the realm which belongs to the executive. Courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa will bring about disrepute to our system of government which upholds the separation of powers between the three main components vis a vis the executive, the legislature and the judiciary.*

A [21] Of course, in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary irrational or there are elements of mala fides and abuse of power, the court is duty bound to interfere. Whether or not the court should interfere clearly depends on the facts and circumstances of each case. On the facts and circumstance of this case we are inclined to agree with the Court of Appeal that the decision of the first respondent and/or the second respondent is not amenable to judicial review. (Emphasis added.)

[27] Premised upon the authorities and materials above, the relevant principles on justiciability in judicial review, particularly in relation to the policy or action of the executive, are accordingly discerned in the following manner:

(a) justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority;

(b) non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief;

(c) generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination;

(d) even where it appears prima facie that some fundamental right has been violated by an executive act, the court cannot interfere with that act on the ground of unconstitutionality because of general principles relating to the limits of the judicial method and the rule of the judiciary, and the lack of satisfactory criteria for a judicial determination of certain questions;

(e) government policies emanate after consideration of a number of technical factors which are often non-legal, and judges do not possess the necessary information and expertise to evaluate these non-legal factors in order to pass judgment on the appropriateness or adequacy of a particular policy;

(f) it is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinise it and test the degree of its beneficial or equitable disposition for the purpose of varying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitution, statutory or any provision of law;

(g) where the policy or action of the executive is inconsistent with the

Federal Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power, the court is duty bound to interfere; and

(h) courts must be wary of unduly extending their judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa will bring about disrepute to our system of government which upholds the separation of powers between the three main components vis a vis the executive, the legislature and the judiciary.

[28] As a consequence, on the facts and circumstances of the present case, the court may therefore interfere on the grounds of illegality and irrationality if the first respondent's decision is inconsistent with the Federal Constitution and in any manner irrational.

Illegality

[29] As held in the case of *CCSU* and approved by the Supreme Court in *Persatuan Aliran Kesedaran Negara*, illegality means that 'the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable'.

[30] The present case before this court does not involve 'the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers'. Instead, following the case of *Dr Michael Jeyakumar*, the first respondent's decision is a policy matter of the first respondent, which emanated after consideration of non-legal factors.

[31] Even though it is a realm which exclusively belongs to the first respondent, where the court would dissuade themselves from entering into it. The Federal Court in *Dr Michael Jeyakumar* had held that the court is duty bound to interfere if the policy or action of the executive is inconsistent with the Federal Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power.

[32] In addition, the Supreme Court in the case of *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 (SC) had also held that the court can interfere with an act of executive authority if it contravenes the law, as follows:

A A general guideline on the functions of the court before interfering in the exercise of an executive discretion can be found in the judgment of Lord Greene MR in the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. *The courts can only interfere with an act of executive authority if it is shown that the authority has contravened the law.* Secondly, the court is not a court of appeal in such matters. Thirdly, the exercise of such discretion is governed by certain principles and so long as the exercise is within the four corners of these principles, the discretion is absolute and cannot be questioned in a court of law. Lord Greene elaborated on those principles and they are that the exercise of the discretion must be a real exercise of the discretion and that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. If the authority fails to observe these principles, the exercise of discretion cannot be said to be 'reasonable'. (Emphasis added.)

[33] In the case of *Dominic Lau Hoe Chai v Maszlee bin Malik & Ors* [2020] 8 MLJ 50 (HC) ('Dominic Lau'), the applicant sought leave to commence an application of judicial review against the Minister and Deputy Minister of Education, the Ministry of Education and the Government of Malaysia with regard to the decision to implement Jawi writing in the Malay Language subject taught at the National Type and National Schools beginning with the year 2020 which was made by the Cabinet. The applicant argued that such a decision which was an education policy was unconstitutional as being inconsistent with art 12(3) of the Federal Constitution as follows:

12 Rights in respect of education

...

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

[34] By referring to the case of *Dr Michael Jeyakumar,* the High Court was of the opinion that there was no arguable case for a perceived breach of art 12(3) of the Federal Constitution, which does not prohibit the learning of a particular language where the script also incidentally forms the script of a holy text of a religion. Furthermore, it was also held that such a policy decision was not amenable to judicial review, the reasons that it concerned considerations of non-legal factors in the domain of the Executive and that it is the exclusive right of the Federal Government to decide what kind of education policy should be implemented in the country.

[35] The case of *Dominic Lau* is however distinguishable, where it concerns the education policy where the suit was filed against the Federal Government on education policy which is within the exclusive right of the Federal Government to decide.

[36] In the present case, it was argued in the applicants' written submission that the first respondent's decision is inconsistent with the Federal Constitution where under art 80(1) thereof the executive authority of the State of Kedah only extends to all matters to which the State Legislature of Kedah may make laws. Under art 74 reading together with item 4(1) of the Federal List, betting and lotteries fall under the purview of the Federal Government, and therefore the first respondent could not exercise its executive authority on matters pertaining to gambling.

[37] On the other hand, in the first respondent's written submission, it was argued that the first respondent's Decision is merely an instruction to cease the renewal of the premise licence for gambling by the local authority in the State of Kedah. Furthermore, it was submitted that the matter of local authority falls under item 4 of the State List to the Federal Constitution.

[38] For the purpose of convenience, arts 74, 80(1), item 4(1) of the Federal List and item 4 of the State List are reproduced below:

74 Subject matter of federal and State laws

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

80 Distribution of Executive powers

(1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.

NINTH SCHEDULE

[Articles 74, 77]

Legislative Lists

List I — Federal List

4. Civil and criminal law and procedure and the administration of justice, including —

...

(I) Betting and lotteries.

...

List II — State List

...

4. Local government outside the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, including —

(a) Local administration; municipal corporations; local, town and rural board and other local authorities; local government services, local rates, local government elections;

(b) Obnoxious trades and public nuisances in local authority areas; and

(c) (Repealed);

[39] Upon examination of all the relevant cause papers and written submissions, the court is of the view that the first respondent's decision was made contrary to art 80(1) reading with art 74 and item 4(1) of the Federal List of the Federal Constitution. Therefore, the court is duty bound to interfere, and the application for judicial review ought to be granted on the ground of illegality, upon the detailed reasons elaborated below.

[40] Pursuant to the case of *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 (FC) ('Letitia Bosman'),

Azahar Mohamed CJ (Malaya) by majority had provided extensive insight with regard to the interpretation of entries in the Legislative Lists of the Ninth Schedule to the Federal Constitution in the following passages:

[49] Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament *The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the Legislative branch of the government to make laws with respect to any of the matters enumerated in cl (1) art 74 of the FC and the Federal List as set out in the Ninth Schedule*. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, *item 4 of the Federal List provides for 'civil and criminal law', including in para (h) 'creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law'.*

[50] An important point to note is that the words 'with respect to' in art 74 must be interpreted with extensive amplitude. *The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that*

each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in widest amplitude (see: *Raja Jagannath Baksh Singh v The State of Uttar Pradesh* [1962] AIR 1563, *The State of Rajasthan v Shri G Chawla and Dr Pohumai* [1959] AIR 544 and *Elel Hotels And Investments Ltd v Union Of India* [1990] AIR 1664). I have also discussed this area of the law in *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398. As observed by the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 at p 37:

> It is also well settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution — the provision conferring legislative power upon the Federal and State Governments respectively — is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v The Commonwealth* [1948] 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative authority:
>
> A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary as wide as that of the Imperial Parliament itself: *R v Burah* [1878] 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117*, But the power is plenary only with respect to the specified subject*

[51] Another equally important point to note is that *the function of the entries in the Legislative Lists in the Ninth Schedule is not to confer powers of legislation, but merely to demarcate the fields in which legislative bodies operate.* In *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417, the Federal Court summarised the principles applicable to the interpretation of entries in the legislative lists as follows:

(a) the entries in the legislative lists do not confer legislative power Rather, they are broad heads or fields of legislation to demarcate the respective areas in which Parliament and the State Legislature may operate;

(b) the entries must be interpreted liberally with the widest amplitude, and not narrowly or restrictively. Each entry extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it;

(c) *the rule of widest construction does not permit an entry to be interpreted so as to include matters with no rational connection to it or to override or render meaningless another entry*;

(d) *in the event of apparent conflict or overlap between entries, the court should attempt to reconcile the entries by adopting a harmonious construction; and*

(e) *in interpreting a particular entry, the court should confine its decision to the*

A *concrete question arising from the case, without pronouncing a more exhaustive definition than is necessary.* (Emphasis added.)

B **[41]** Following the majority judgment of *Letitia Bosman*, the relevant principles with regard to the interpretation of entries in the Legislative Lists of the Ninth Schedule to the Federal Constitution can thus be gleaned that the cardinal rule of interpretation is that the entries in the Legislative Lists in the Ninth Schedule to the Federal Constitution are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

C

D **[42]** Moreover, in the event of apparent conflict or overlap between entries, the court should attempt to reconcile the entries by adopting a harmonious construction. The rule of widest construction does not permit an entry to be interpreted so as to include matters with no rational connection to it or to override or render meaningless another entry. What then follows is that the court in interpreting a particular entry should confine its decision to the concrete question arising from the case, without pronouncing a more exhaustive definition than is necessary.

E

F **[43]** Even though the first respondent had the Executive authority on the matter of local authority in relation to the premise licence for gambling according to art 80 reading together with art 74 and item 4 of the State List of the Federal Constitution, the first respondent's decision to cease the renewal of premise licence for gambling in effect rendered item 4(1) of the Federal List on betting and lotteries meaningless as it has been of the matter of local authority to ban betting and lotteries under the subject matter of premise licence for gambling.

G

[44] According to the first respondent's decision, the first respondent had agreed that all the premise licences for the number of forecast operators and association clubs for gambling in the State of Kedah discontinued and that if there was a licensed operator who still operated after 31 December 2022, the local authority together with the Royal Malaysia Police would undertake strict enforcement The foregoing decisions strenuously direct the decision to the banning of pool betting in the State of Kedah altogether.

H

I **[45]** To fortify and further support the foregoing, the second respondent had in the affidavit provided the reasons for not renewing the premise licences for gambling, where it had been admitted to banning gambling activity through the decision of not renewing premise licences for gambling as follows:

14. Seterusnya bagi menjawab perenggan 24 dan 25 Afidavit tersebut berhubung keputusan untuk tidak memperbaharui lesen premis perjudian, adalah seperti yang berikut:

(a) Hak Responden untuk menentukan hala tuju dasar pemerintahan sebagai sebuah Kerajaan.

(i) Responden menegaskan bahawa Responden berhak membuat apa-apa keputusan dari segi dasar dan menetapkan hala tuju yang wajardan perlu pada pertimbangan Responden demi kebaikan rakyat Negeri Kedah secara keseluruhan. Keputusan tersebut dibuat secara kolektif oleh Responden dan telah menjadikan ia suatu keputusan dasar Responden dalam perkara tersebut

(ii) Responden telah membuat pertimbangan berdasarkan kemaslahatan rakyat Negeri Kedah terutamanya yang beragama Islam kerana kesan negatif daripada aktiviti perjudian adalah melebihi daripada kebaikan yang antara lainnya ia menyebabkan keruntuhan institusi kekeluargaan, menyebabkan keberhutangan yang serius dan menjadi perosak kepada tamadun manusia.

(iii) *Keputusan Responden untuk melarang aktiviti perjudian adalah langkah terbaik dan wajar* untuk rakyat Negeri Kedah dan dalam Responden membuat keputusan itu, kepentingan rakyat Negeri Kedah secara keseluruhan adalah lebih diutamakan berbanding kepentingan individu atau entiti tertentu. Perkara-perkara yang ditimbang oleh Responden itu telah disusuli dengan kenyataan media yang telah saya buatpada 14.11.2021 ... (Emphasis added.)

[46] Thus, the first respondent's decision to cease the renewal of the premise licence for gambling is inconsistent with art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution, upon the following reasonings:

(a) each general word of the entries in the Legislative Lists in the Ninth Schedule to the Federal Constitution should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it, and therefore there is no difficulty for item 4 of the State List to be interpreted to include matter of local authority in relation to the premise licence for gambling;

(b) however, the matter in issue is far beyond that, which had been extended to the matter of local authority banning betting and lotteries under the subject matter of premise licence for gambling. This would then cause apparent conflict or overlap between the entry of item 4 of the State List and the entry of item 4(1) of the Federal List, where the Court should attempt to reconcile them by adopting a harmonious construction. It must be borne in mind that the rule of widest construction does not

permit an entry to be interpreted so as to include matters with no rational connection to it or to override or render meaningless another entry;

(c) undertaking the exercise of harmonious construction, it may only allow the matter of local authority in relation to the premise licence for gambling, but not to the extent of banning betting and lotteries. Otherwise, it would be including matter to override or render meaningless the entry in item 4(1) of the Federal List; and

(d) as a result, the matter of local authority to ban betting and lotteries under the subject matter of premise licence for gambling has no rational connection to item 4 of the State List, instead, it has the effect of overriding and rendering meaningless the entry of betting and lotteries in item 4(1) of the Federal List.

[47] Having reached the decision above, the court is, therefore, duty bound to interfere as the first respondent's decision of the first respondent is inconsistent with the Federal Constitution, where the first respondent had acted illegally and/or ultra vires of its authority when it arrived and implemented the first respondent's decision and failed to understand, inter alia, that:

(a) pool betting and lotteries are matters in item 4(1) of the Federal List and not under the State List. Implementation of the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional for being inconsistent with art 80 read together with art 74 and item 4(1) of the Federal List of the Federal Constitution; and

(b) the first respondent had erred in law in arriving at the first respondent's decision in disregard of art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution that pool betting and lotteries are matters under the Federal List and not State List.

Irrationality and unreasonableness

[48] As held in the case of *CCSU* and approved by the Supreme Court in *Persatuan Aliran Kesedaran Negara,* irrationality is referred to as '*Wednesbury* unreasonableness', which applies to 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.

[49] In the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 (SC), the Supreme Court explained the legal position of *Wednesbury* unreasonableness in great length as follows:

We would first deal with the question of unreasonableness. No less than 15 grounds were given in the memorandum of appeal, but some of the grounds were overlapping, repeating the same grounds but couched in different language and we consider it only necessary to deal with the grounds attacking the validity of the decision on the two issues since they are really the main grounds of appeal. Some of the grounds are in the nature of arguments and not grounds of appeal. On the question of unreasonableness, it is unclear from the notes of proceedings and the arguments before us in what sense is the word 'unreasonable' used by the appellant As we have pointed out in the case of *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers, in law, there are two categories of unreasonableness one of which is referred to as comprehensive unreasonableness and the other is a distinct category of unreasonableness altogether which, with reference to a decision, amounts to an absurd or perverted decision which is a perverse finding, so devoid of plausible justification that no reasonable body of persons could have reached it Both categories are now known as the Wednesbury principles of unreasonableness* because they were first pronounced by Lord Greene MR in the case of *Associated Provincial Picture Houses v Wednesbury Corp*. Perhaps, for the purpose of emphasis, it bears repetition to state what Lord Greene MR actually meant when he spoke of the two types of unreasonableness at pp 229 and 234. On the broad or *comprehensive unreasonableness,* this is how Lord Green MR explained the expression at p 229:

> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out Bad faith, dishonesty — those of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.
>
> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, *a person entrusted with a discretion must so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider He must exclude from his consideration matters which are irrelevant to what he has to consider If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.* (Emphasis added.)

At p 234, Lord Greene MR expressed his view as to what amounted to *'unreasonableness' of the other type.* This is his explanation:

> Once that question is answered in favour of the local authority, it may be still possible to say that, *although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.* In such a case, again, I think the court can interfere. (Emphasis added.)

[50] Following the authority above, there are thus two categories of unreasonableness, which are both known as the *Wednesbury* principles of unreasonableness as follows:

(a) the first category is comprehensive unreasonableness, which is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law taking into consideration the matters which he is bound to consider and excluding from his consideration matters which are irrelevant. Otherwise, he may truly be said to be acting 'unreasonably'; and

(b) the second category lies in the circumstances where the local authority has kept within the four corners of the matters that they ought to consider, but they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

[51] Following the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 (FC), Arifin Zakaria CJ in the majority judgment held that the applicable test for judicial review is an objective test as follows:

> [27] Having considered the issue at hand, I agree with learned counsel for the applicant that *the law on judicial review has advanced from the subjective to that of the objective test* Hence, in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 (FC), Suffian LP observed:
>
> > It will be noted that s 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc. In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and *the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable* — see the cases cited by the learned judge at p 360. (Emphasis added.)

[52] At the risk of repetition, the grounds for judicial review on irrationality against the first respondent are summarised below and are that the first respondent had acted unreasonably and failed to take into account relevant considerations in reaching the first respondent's decision by:

(a) failing to understand that pool betting and lotteries are matters within item 4(1) of the Federal List and not under the State List. Implementation of the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional for being inconsistent with, inter alia, arts 74 and 75 of the Federal Constitution. The first

respondent had exceeded its power in implementing the first respondent's decision as betting and lotteries are matters within item 4(1) of the Federal List and not under the State List;

(b) arriving at the first respondent's decision and issuing the notice and the action of not renewing and revoking the premise licence of premises for pool betting were intended to ban the business of pool betting in the State of Kedah. It was done mala fide as the Respondents were aware that the jurisdiction regarding the business of pool betting and lotteries are matters within the Federal List and not the State List;

(c) failing to take into account that the first respondent's decision causes loss in livelihood, income and/or business of the applicants;

(d) failing to take into account that the first respondent's decision brings direct impact to the applicants who are unable to collect, carry out or operate pool betting through their agents, namely the applicants and/or other agents in the State of Kedah. Therefore, this will have a paralysing effect on the staff and/or employees of the applicants, especially those who reside in the State of Kedah;

(e) failing to take into account that the State of Kedah is a State multiracial community, and the implementation of banning pool betting which was participated by non-Muslims is an unreasonable infringement of the rights of non-Muslims in the State of Kedah for the collection, operation or promotion of pool betting or taking part therein. Therefore, this is inconsistent with art 8 of the Federal Constitution;

(f) the first respondent's decision to ban pool betting in the State of Kedah by cancelling the renewal of the premise licence for the activities of pool betting is unreasonable and inconsistent with common sense, and an unfair discrimination against the non-Muslim in the State of Kedah who have been deprived of collecting, promoting, operating or participating in pool betting, while it is allowed in other States in Malaysia. This is a violation of art 8 of the Federal Constitution; and

(g) the implementation by the first respondent and/or the second respondent in enforcing the first respondent's decision is unreasonable and irrational.

[53] At this juncture, the pertinent issue to be determined is whether the first respondent had directed himself properly in law taking into consideration the matters which he is bound to consider and excluding from his consideration matters which are irrelevant, which falls under the first category of unreasonableness.

[54] In the case of *Nestle Products Sdn Bhd v Mahkamah Perusahaan Malaysia*

& Anor [2013] 8 CLJ 586 (HC), it was held that error of law committed by the Industrial Court constituted the grounds for irrationality in the *Wednesbury*'s sense as follows:

> [42] It is plain that the [Industrial Court] had committed several errors of fact and law which warrants interference by this court. *[The industrial Court] had failed to, amongst others, apply the correct principles of industrial law and jurisprudence pertaining to the applicant's exercise of managerial prerogative to transfer, applied the wrong tests, had taken into account irrelevant considerations and failed to take into account relevant consideration. The [Industrial Court's] award can be characterised as one which is irrational in the Wednesbury's sense.* (Emphasis added.)

[55] Following the finding above that the first respondent's decision to cease the renewal of premise licence for gambling is inconsistent with art 80 reading together with art 74 and item 4 of the State List of the Federal Constitution, the failure of the first respondent to understand that pool betting and lotteries are matters within item 4(1) of the Federal List and not under the State List is, therefore, a relevant consideration that the first respondent is bound to consider.

[56] The subsequent matter was raised that the arrival at the first respondent's decision and issuing the Municipal letters and the action of not renewing and revoking the premise licence of the premises for pool betting were intended to ban the business of pool betting in the State of Kedah, whereby it was done mala fide as the respondents were aware that the jurisdiction regarding the business of pool betting and lotteries are matters within the Federal List and not the State List.

[57] Following the earlier finding above, even though the matter in issue had been extended to the matter of local authority to ban betting and lotteries under the subject matter of premise licence for gambling, it does not necessarily denote the element of mala fide in the first respondent's decision. The very reason lies in the constitutional issue which was not resolved at the material time as discussed above that there was an apparent conflict or overlap between the entry of item 4 of the State List and the entry of item 4(1) of the Federal List, where the court should attempt to reconcile them by adopting a harmonious construction. Not only that, the second respondent had also in the affidavit provided the reasons for not renewing the premise licences for gambling as discussed above. Therefore, the matter of mala fide does not constitute a ground for irrationality.

[58] Coming to the matters concerning livelihood, the applicants raised that the first respondent failed to take into account that the first respondent's decision causes loss in livelihood, income and/or business of the applicants,

and it also failed to take into account that it brings direct impact to the applicants who are unable to collect, carry out or operate pool betting through their agents.

[59] Upon perusal of the facts in the present case, the court is of the considered view that the aforesaid matters were taken into account by the first respondent on a collective basis, as shown in the reasons provided by the second respondent in the affidavit as follows:

> 14. Seterusnya bagi menjawab perenggan 24 dan 25 Afidavit tersebut berhubung keputusan untuk tidak memperbaharui lesen premis perjudian, adalah seperti yang berikut:
>
> (a) Hak Responden untuk menentukan hala tuju dasar pemerintahan sebagai sebuah Kerajaan.
>
> (i) Responden menegaskan bahawa Responden berhak membuat apa-apa keputusan dan segi dasar dan menetapkan hala tuju yang wajar dan perlu pada pertimbangan Responden demi kebaikan rakyat Negeri Kedah secara keseiuruhan. Keputusan tersebut dibuat secara kolektif oleh Responden dan telah menjadikan ia suatu keputusan dasar Responden dalam perkara tersebut.
>
> (ii) *Responden telah membuat pertimbangan berdasarkan kemaslahatan rakyat Negeri Kedah terutamanya yang beragama Islam kerana kesan negatif daripada aktiviti perjuduan adalah melebihi daripada kebaikan* yang antara lainnya ia menyebabkan keruntuhan institusi kekeluargaan, menyebabkan keberhutangan yang serius dan menjadi perosak kepada tamadun manusia.
>
> (iii) *Keputusan Responden untuk melarang aktiviti perjudian adalah langkah terbaik dan wajar untuk rakyat Negeri Kedah dan dalam Responden membuat keputusan itu, kepentingan rakyat Negeri Kedah secara keseluruhan adalah lebih diutamakan berbanding kepentingan individu atau entity tertentu.* Perkara-perkara yang ditimbang oleh Responden itu telah disusuli dengan kenyataan media yang telah saya buat pada 14.11.2021 ... (Emphasis added.)

[60] As demonstrated above, the first respondent had made consideration of the benefits of the people in the State of Kedah as a whole, where the interest of the people of Kedah outweighed the interest of certain individuals or entities in banning the activity of gambling. As such, it is untenable for the applicants to claim that the first respondent failed to take into consideration the matters concerning their livelihood in reaching the first respondent's decision.

[61] To sum up, the first respondent had not directed himself properly in law taking into consideration the matters which he is bound to consider, whereby it had acted unreasonably and failed to take into account relevant consideration in reaching the first respondent's decision by failing to understand that betting

and lotteries are matters within item 4(1) of the Federal List and not under the State List. Thus, the application for judicial review ought also to be granted upon the grounds of irrationality.

Article 8 — Equality

[62] For the purpose of convenience, art 8(1) and (2) of the Federal Constitution are reproduced below:

> 8 Equality
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.'

[63] The legal position of arts 8(1) and (2) of the Federal Constitution has recently been revisited and discussed in great length by the Federal Court in the case of *Lai Hen Beng v Public Prosecutor* [2024] 1 MLJ 225 (FC) ('Lai Hen Beng'), as follows:

> [8] In explaining the extent of the application of the two provisions above, Abdoolcader J said as follows in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ('*Harun* (HC)'), at p 119:
>
> > Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in art 8(1). Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under art 8(2) and such discrimination cannot be validated by having recourse to the principle of reasonable classification which is permitted by art 8(1) (*Srinivasa Aiyar v Saraswathi Ammal* AIR [1952] Mad 193 at p 195; *Kathi Railing Rawat v State of Saurashtra* AIR [1952] SC 123 at p 125).
> >
> > In cases not covered by art 8(2), the general principle of equality embodied in art 8(1) is attracted whenever discrimination is alleged, and if accordingly discrimination is alleged on a ground other than those specified in art 8(2), the case must be decided under the general provisions of art 8(1). Article 8(1) and (2) must be read together, their combined effect is not that the State cannot discriminate or pass unequal laws, but that if it does so, the discrimination or the inequality must be based on some reasonable ground (art 8(1)), and that, due to art 8(2), religion, race, descent or place of birth alone is not and cannot be a reasonable ground of discrimination against citizens. The word 'discrimination' in art 8(2) involves an element of unfavourable bias.

> The use of the word 'only' in art 8(2) connotes that what is discountenanced is discrimination purely and solely on account of all or any one or more of the grounds mentioned in that clause. A discrimination based on any of these grounds and also on other grounds is not affected by art 8(2) though it may be hit by art 8(1) (*Anjali v State of West Bengal* AIR [1952] Cal 825 829 at p 829).

[9] To summarise, both cll (1) and (2) of art 8 though related, are applied with differing specificity. In relation to art 8(2), the standard presumption of constitutionality of legislation/act applies. It is for the attacking party to overcome the presumption by demonstrating how the impugned provision violates any one or more of the limbs of cl (2). The use of the word 'only' in art 8(2) requires that the alleged discrimination is specific to any of the grounds mentioned in cl (2).

[10] Once the attack has been mounted, the defending party must then demonstrate either one of two things. First, that the impugned matter does not discriminate on any of the grounds argued. Or, if this cannot be demonstrated, then the defending party is only left with the option of establishing that the discrimination is 'expressly authorised' by the FC.

[11] In this sense, *art 8(2) is a very specific provision. If a challenge is successfully made on any of the grounds mentioned in art 8(2)*, it would follow that the impugned matter/legislation/act is inconsistent with the FC and is liable to be struck down under art 4(1) if it is post-Merdeka. Otherwise, it must be dealt with in accordance with art 162(6).

[12] *Article 8(1) on the other hand is a more generic provision when compared to art 8(2). Article 8(1) is a catch-all provision that outlaws discrimination in cases that might not fall within the umbrella of art 8(2).* In such a challenge, and taking guidance from the decision of the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 ('*Harun* (FC)'), two things must be shown.

[13] Firstly, it must be shown that the discrimination is founded on an intelligible differentia distinguishing between persons that can be grouped together from others left out of the group. Secondly, the differentiation must have a rational relation to the object sought to be achieved by the impugned law. The classification may be founded on different bases such as geography, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of the classification and the object of the law in question.

[14] In the relatively recent judgment of this court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo), this court also emphasised the importance of the test of proportionality which is housed in art 8(1) read with art 5(1). In other words, not only must there be a nexus between the impugned legislative measure and the legitimate legislative aim, but the measure itself (which infringes upon a fundamental right) must itself be proportionate to the legitimate legislative objective. If it does not meet the test of reasonable classification or meets it but fails to have any nexus to any legitimate legislative aim, then the impugned provision/act runs afoul of art 8(1) and is liable to be dealt with either under arts 4(1) or 162, as the case may be.

[15] At this point, another observation has to be made about art 8(2). At the time Harun (HC) and Harun — Federal Court were decided, art 8(2) had not yet been

amended. In 2001, the FC was amended vide Act A1130 by inserting into art 8(2) the word 'gender'. In other words, and in addition to the other specific stipulations, art 8(2) *also expressly prohibits (unless expressly authorised by the FC) discrimination in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment, inter alia, only on the grounds of gender.*

[16] The 2001 constitutional amendment only added another prohibited category of discrimination (gender) but did not otherwise change the basis of the application of cll (1) and (2) of art 8 as espoused in *Harun* (HC) and *Harun* (FC). As such, while the respondent has made the commendable attempt of taking us through the legislative history of the amendment to art 8(2) leading up to the insertion of the 'gender' category, we do not, with respect, consider the said legislative history relevant to the discussion in this case as nothing turns on it'. (Emphasis added.)

[64] The applicants in the grounds for illegality and irrationality argued that there is a violation of art 8 of the Federal Constitution upon the following matters:

(a) there is an *unreasonable infringement of the rights of non-Muslims in the State of Kedah* for the collection, operation or promotion of pool betting or taking part therein (illegality);

(b) the first respondent failed to take into account that the State of Kedah is a State multiracial community, and the implementation of banning pool betting which was participated by non-Muslims is an *unreasonable infringement of the rights of non-Muslims in the State of Kedah* for the collection, operation or promotion of pool betting or taking part therein (irrationality); and

(c) there is *unfair discrimination against non-Muslim* in *the State of Kedah* who have been deprived of collecting, promoting, operating or participating in pool betting, while it is allowed in other States in Malaysia (irrationality).

[65] In the case of *Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Perdagangan Semenanjung Malaysia & Anor* [2012] 6 MLJ 18 (CA), the applicant brought an action by way of judicial review to seek an order of mandamus and declaration that the first respondent's decision of approving the application of Rangkaian Pengangkutan Integrasi Deras Sdn Bhd ('RapidKL') to impose rates of fare for stage bus without adhering to the Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 and the failure, refusal or omission on the part of the first and second respondents to enforce the rates of fare as prescribed in the said Rules on RapidKL had violated art 8(1) of the Federal Constitution. The gist of the complaint pertained to a huge loss as a direct consequence of the lower rates charged by RapidKL as approved by the first respondent.

[66] The High Court granted a declaration that the first respondent's decision on approving the company's application to impose rates of fare without adhering to the said Rules as being ultra vires the said Rules, but it refused to grant a declaration for violation of art 8(1) of the Federal Constitution as there was insufficient evidence to find that the first and second respondents unfairly discriminated against the applicant in favour of RapidKL.

[67] On appeal, the Court of Appeal agreed with the High Court and held that there was insufficient evidence to support a finding that the first respondent and/or the second respondent had practised unfair discrimination on the applicant In so deciding, the Court of Appeal relied upon the following test:

> When the appeal came before this court, learned counsel for the applicant chose to abandon completely the mandamus relief. In effect, learned counsel restricted the applicants appeal to just one ground only, namely for a declaration that the first respondents decision approving RapidKL's application to impose rates of fare for stage buses without adhering to the 2000 Rules and or the failure of the first and second respondents to enforce the rates of the 2000 Rules on RapidKL had violated art 8(1) of the Federal Constitution and for that reason damages is claimable.
>
> As in the High Court, it is not contended by the applicant before this court that the 1987 Act and or the 2000 Rules are discriminatory. Instead, *the thrust of the applicant's contention is that both the first and second respondents had practised unfair discrimination on the applicant* The applicant's contention is that the first respondent as the administrative authority entrusted and assigned with the duty and responsibility of carrying the 1987 Act and the 2000 Rules into operation, has acted in a discriminatory manner by treating equals differentially or by not following the policy or principle laid down in that statute regarding its exercise of such a discretion. In this regard, it is the argument of learned counsel for the applicant that both the applicant and RapidKL provide the same stage bus services. Hence, the applicant and RapidKL fall within the same class of public vehicle services as classified by Parliament in the 1987 Act. *Though similarly situated within the same class, it was argued that the first respondent had treated RapidKL differently by allowing RapidKL to charge fares, without any need to adhere to the 2000 Rules. It was then argued that the constitutional right of the applicant under art 8(1) of the Federal Constitution had been violated as a result of the administrative action of both the first and second respondents because the first respondent has treated the applicant and RapidKL differently in terms of the fares to be charged for the same stage bus services; and that the first respondent did not follow the 2000 Rules in regulating its powers to impose condition under the 1987 Act.* Learned counsel then brought to the attention of this court the judgment of the Court of Appeal in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 24 to support the proposition that unfair discrimination is an actionable wrong under our law and that damages is claimable if there is a breach of art 8 of the Federal Constitution.
>
> As a starting point, *art 8(1) of the Federal Constitution expressly provides that all persons are equal before the law and entitled to the equal protection of the law. It is trite law that executive or administrative action which resulted in denial of equal protection*

of law or equality before law is actionable and can be judicially reviewed as being violative of art 8 of the Federal Constitution.

In *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang*, the Court of Appeal laid down *three essential elements that must be proved in order to succeed in establishing unfair discrimination.*

These elements were explained by Abdul Malek Ahmad JCA (as His Lordship then was) in the following words:

> *In our judgment for unfair discrimination to be actionable, the following elements must be proved to exist:*
>
> (a) *there must be some form of discrimination;*
>
> (b) *the discrimination must be unfair; and*
>
> (c) *there must be resultant harm or injury.*
>
> *Taking the first ingredient a plaintiff, in order to succeed in an action for unfair discrimination, must establish that discrimination was practised upon him. Generally speaking, discrimination usually occurs when equals are treated unequally or when unequals are treated equally.* See *All India Sainik Schools Employees Association v The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society New Delhi & Ors AIR 1989 SC 88* at p 92. However, it ail depends upon the facts of a given case. *It is the conduct of the defendant towards the particular plaintiff that calls for attention and not particular acts or omissions.* But this statement must not be taken too far. For, cases may occur where a single act or omission on the part of the defendant may have a continuing discriminatory effect upon the plaintiff. Take the case of promotions in the sphere of employment If a plaintiff's promotion is withheld while another who is similarly circumstanced is promoted, it is but one act, or more appropriately, one omission. Nevertheless, it has a discriminatory effect upon the plaintiff. *Whether discrimination was practised in a particular case is a question of fact depending upon the facts and circumstances of the given case*. See *Indian Oil Corp Ltd v Premier Road Carriers Ltd* AIR 1983 Cal 445.
>
> *Discrimination perse is not actionable unless it is also unfair, and this brings us to the second ingredient.* To be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words, *there must be unjust or unreasonable or unfair bias in favour of one and against another*. See *Dost Mohammod v Union of India* 1981 Lab IC 1210; *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268. Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is that nexus may be based on sociological or economic or cultural considerations. But the reference to the existence of such a nexus is merely a guide. *At the end of the day, an objective assessment of the facts of a particular case should leave the court with the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant*
>
> *The third ingredient of the wrong is damage.* One who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he has suffered some injury recognised by law. The injury may

take the form of pecuniary loss. Or it may be non-pecuniary, such as injury to reputation or to property or to livelihood. So long as there is some injury which the law recognises, the third requirement is met. (Emphasis added.)

[68] In the case of *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681 (FC), the Federal Court held that in invoking art 8 of the Federal Constitution the applicant must show discrimination by some law or action of the Executive and that the equal protection in art 8(1) of the Federal Constitution only confers to persons in the same class, as follows:

13. We took time to examine this allegation carefully and we found that it is simply not possible to expand the scope of art 8 of the Federal Constitution to cover collective agreements such as the one in question. *To invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said Article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies.* Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the law' in art 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.

18. In the circumstances, in construing art 8 of the Federal Constitution, our hands are tied. *The equal protection in cl (1) of art 8 thereof extends only to persons in the same class. It recognises that all persons by nature, attainment circumstances and the varying needs of different classes of persons often require separate treatment.* Regardless of how we try to interpret art 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention. We are also in agreement with the views expressed by Suffian LP in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 at pp 165 and 166 on this point. (Emphasis added.)

[69] Premised upon the authority above, it has been established that executive or administrative action which resulted in denial of equal protection of law or equality before law is actionable and can be judicially reviewed as being violative of art 8 of the Federal Constitution upon satisfying the following three ingredients:

(a) there must be some form of discrimination ('first ingredient');

(b) the discrimination must be unfair ('second ingredient'); and

(c) there must be resultant harm or injury ('third ingredient').

[70] In the present case, the applicants claimed that there is unfair discrimination against the non-Muslims in the State of Kedah who have been deprived of collecting, promoting, operating or participating in pool betting, while it is allowed in other States in Malaysia.

[71] However, with regard to the first ingredient, the pertinent question is whether discrimination was practised against the applicants by determining whether the applicants were treated unequally. Therefore, the applicants' claim for unfair discrimination against the non-Muslims in the State of Kedah is misconceived as the equal protection in art 8(1) of the Federal Constitution only extends to persons in the same class, who are the licensed holders of the premise licences for the number forecast operators and association clubs for gambling in the State of Kedah.

[72] In any event, the court is of the opinion that the first ingredient is not satisfied as the applicants were not treated unequally by the first respondent where it was clearly stated in the first respondent's decision itself that all the premise licences for the number forecast operators and association clubs for gambling in the State of Kedah are discontinued. Therefore, it undoubtedly shows that such first respondent's decision applied to all persons in the same class, and thus there is no room for discrimination against the applicants, let alone unfair discrimination.

[73] Despite that, the applicants had also placed their reliance on art 8(2) of the Federal Constitution, where it was *submitted* that 'there shall be no discrimination on the carrying on of any trade, business, profession, vocation or employment, on grounds of race, religion, etc — unless expressly provided by the Federal Constitution itself'.

[74] For purpose of convenience, art 8(2) of the Federal Constitution is reproduced below:

> 8 Equality
>
> ...
>
> (2) Except as expressly authorized by this Constitution, there shall be *no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender* in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[75] A critical reading of art 8(2) of the Federal Constitution suggests that there is a combination of two parts. The first part denotes the ground for discrimination that there shall be no discrimination against citizens on the grounds only of religion, race, descent, place of birth or gender. On the other hand, the second part denotes the area where the discrimination may take place, where it shall be read disjunctively as indicated by the preposition 'in', namely 'in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying

on of any trade, business, profession, vocation or employment'. Otherwise, in not following and not being guided by the preposition 'in', it would pervert the language in art 8(2) of the Federal Constitution to read in our case that 'Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race ... carrying on of any trade, business, profession, vocation or employment'.

[76] A clear example is demonstrated in the case of *Lai Hen Beng* on discrimination on the grounds of gender as follows:

> [15] At this point, another observation has to be made about art 8(2). At the time Harun (HC) and Harun — Federal Court were decided, art 8(2) had not yet been amended. In 2001, the FC was amended vide Act A1130 by inserting into art 8(2) the word 'gender'. In other words, and in addition to the other specific stipulations, *art 8(2) also expressly prohibits (unless expressly authorised by the FC) discrimination in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment, inter alia, only on the grounds of gender.* (Emphasis added.)

[77] Another example would be the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832 (HC), where the High Court read art 8(2) of the Federal Constitution in the context of gender discrimination in employment as follows:

> [18] Now back to the main issue; art 8(2) of the Federal Constitution provides, inter alia, that there shall be no discrimination on the ground only of gender *in the appointment of any office or employment under a public authority* ... (Emphasis added.)

[78] Even though the Federal Constitution is not to be construed in any narrow or pedantic sense, it does not grant any permission to stretch or pervert the language therein, as held in the case of *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 where Abdoolcader J (as His Lordship then was) held that:

> I said in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 (at page 120), 119, 120 that the Constitution is not to be construed in any narrow or pedantic sense (*James v Commonwealth of Australia)* [1936] AC 578 (at page 614), 614) but *this does not mean that a court is at liberty to stretch or pervert the language of the Constitution* in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. (Emphasis added.)

[79] As a result, the part of 'carrying on of any trade, business, profession, vocation or employment' ought to be read in connection to the earlier part of 'in the administration of any law relating to', which would be read as in the

administration of any law relating to the carrying on of any trade, business, profession, vocation or employment. In the present case, the dispute does not involve the administration of any law relating to pool betting, instead, the issue lies in the first respondent's decision.

[80] After close examination and reading of art 8(2) of the Federal Constitution, the court is of the opinion that the applicants' submission above is devoid of merits and shall accordingly be rejected upon the reasoning discussed above.

[81] Accordingly, based on the discussion and authority above, the grounds for illegality and irrationality in relation to the violation of art 8 of the Federal Constitution are untenable and do not avail the applicants of the application for judicial review.

Mandamus

[82] The first respondent in their submission in reply argued that an order for *mandamus* ought not to be granted as there is no legal duty for the first respondent to do so as whether to allow the renewal of the premise licence for gambling is within its discretion. Accordingly, it was referred to s 107 of Act 171, which it provides the discretion of the local authority to renew and revoke the premise licence for gambling as follows:

> 107 Licences
>
> (1) A local authority in the granting of any licence or permit may prescribe the fees for such licence or permit and the charges for the inspection or supervision of any trade, occupation or premises in respect of which the licence is granted.
>
> (1A) Any licence or permit granted under this Act may be issued jointly with any other licence or permit
>
> (2) Every licence or permit granted shall be subject to such conditions and restrictions as the local authority may think fit and *shall be revocable by the local authority at any time without assigning any reason therefor.*
>
> (2A) The revocation of any particular licence or permit issued jointly with any other licence or permit under subsection (1A) shall not affect the validity of any other licence or permit with which it had been jointly issued.
>
> (3) The local authority *may at its discretion refuse to grant or renew any licence without assigning any reason therefor.* (Emphasis added.)

[83] However, with all due respect, the submission above is misconceived as s 107 of Act 171 applies to the local authority which is defined under s 2 of the same as 'any City Council Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under s 3 of the Federal Capital Act 1960

[Act 190]'. Therefore, s 107 of Act171 does not apply to the first respondent. A

[84] In the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 (FC), Arifin Zakaria FCJ (as His Lordship then was) had ruled on the definition of an order of mandamus to command an authority to perform a public duty required by law, as follows: B

> [63] On the first issue, by definition an order of mandamus is a command issued by the court to an authority *to perform a public duty placed upon it by law.* (Emphasis added.)

C

[85] Not only that, the Court of Appeal in the case of *Menteri Kewangan & Anor v Wincor Nixdorf (M) Sdn Bhd and another appeal* [2016] 4 MLJ 621 (CA) had also recognised the distinction between judicial review to the decision of the inferior tribunal and judicial review with the executive decision, as follows:

D

> [9] The instant case is not related to a decision of an inferior tribunal which was quashed and substituted but it was related to executive decision or its arms in the form of departments and/or agencies under the control of the Minister
>
> [10] In public law field, there are many types of roles the court plays under the Federal Constitution to provide the relief In the instant case, two are relevant which relates to judicial review. One type of judicial review is that related to; (a) judicial review of constitutional amendment; (b) judicial review of legislation; (c) judicial review of executive decision; (d) judicial review of policy decision. In all such judicial review, it is well established that the courts will refrain from substituting the decision of legislature or executive and/or executive arms, etc. *The relief in respect of executive decision is often by way of certiorari quashing the decision if it has been made arbitrarily and/or breach of constitutional framework.* The leading case on arbitrariness often cited by Malaysian courts in Pengarah Tanah dan Galian, *Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 where HRH observed:
>
> > Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.
>
> (see *Marbury v Madison* (1803) 1 Cranch 137; *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157; [2014] 4 CLJ 944 and *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455; [2016] 1 CLJ 911).
>
> [11] *As a general rule, it is not permissible to substitute legislative and/or executive decision though it may be permissible to order mandamus, etc within the framework of*

E F G H I

the constitution and the law and/or give prerogative direction which if not complied with may attract the jurisprudence relating to contempt. By quashinq the decision means it gives the executive another opportunity to reconsider the decision according to law. Only when constant disobeyance is made an order of mandamus may be issued unless it is related to specific legal right or constitutional right where an order for mandamus can be issued in the first instance. It is trite that a remedy in the nature of mandamus is drastic and generally it is only invoked in extra ordinary situations after the courts have been satisfied the applicant has exhausted all other avenues available to him (see *Janab's Key to Civil Procedure* (5th Ed) pp 440–454).

[12] It is now well established that powers of the High Court is not just limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate orders or directions. This may not be the case in England. Indian Supreme Court authorities are in abundance to say in certain circumstances that the courts have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. The test for intervention appears to be that the decision is in defiance of logic and demonstrates patent injustice on the face of record requiring immediate judicial intervention to preserve the Rule of Law relating to Constitutional Supremacy (see *Ramachandran*'s case).

[13] The parameter of judicial intervention in the decision of inferior tribunal which has no nexus to the executive is much wider. When it relates to inferior tribunal courts have not only quashed the decisions, but also substituted and/or varied the decision. Support for the proposition stated above is found in a number of cases in India as well as Malaysia. *However, there is no case directly on point in England or Malaysia cited by the parties to say that the executive decision can be substituted by an order of court as of right* The learned counsel for the respondent was not able to cite any authority in its favour except in reliance on cases such as:

(a) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (FC);

(b) *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629;

(c) *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11;

(d) *Datuk Bandar Kuala Lumpur v lain Azahah bin Zainal Abidin* [1997] 2 MLJ 17; [1997] 2 CLJ 248; and

(e) *Malaysia Trade Union Congress & 13 Others v Menteri Tenaga, Air dan Komunikasi & Another Appeal* [2014] 2 AMR 101; [2014] 2 CLJ 525.

[14] We have carefully perused the above cases and it does not support the proposition that *executive decisions can be substituted in judicial review application as of right more so when there were other reasonable options available to enable the executive to review their decision.*

[15] It is trite that mandamus or prohibition falling under the common law prerogative writs is issued when a legal and/or constitutional rights has been infringed and/or order of court has not been complied by the executive within the spirit and intent of the orders made by court. *We take the view based on the facts of the*

case an order for mandamus and/or prohibition at this stage is premature and the more appropriate order will be to quash the decision of the appellant which was rightly done by His Lordship. In consequence, we partly allowed the appeal for the matter to be remitted back to the appellant for the 'assessment of the remission' with an order that the parties to bear their own costs.

[86] Pursuant to the decision above, it is therefore made clear that for judicial review in relation to the executive decision the relief will be to quash the decision by way of certiorari to give the executive another opportunity to reconsider the decision according to law as it is not permissible to substitute the executive decision by an order of court. However, an order of mandamus may be granted when constant disobedience is made, unless it is related to a specific legal right or constitutional right where an order for mandamus can be issued in the first instance.

[87] As a result, an order of mandamus ought not to be granted in relation to the first respondent's decision as at this juncture it is still premature and not permissible to substitution such decision by an order of court. The more appropriate order would thus be quashing the first respondent's decision by way of certiorari.

CONCLUSION

[88] According to *Bennion on Statutory Interpretation* (7th Ed, LexisNexis, 2017), all enacted laws are presumed to be for the public benefit, there being no sound method of distinguishing between them in this regard. This means that the court must always assume that it is in the public interest to give effect to the intention of the Parliament, once this is ascertained.

[89] The court recognises that Parliament does nothing in vain. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of the enacted laws, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded (see *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (SC); *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1(FC)). When the law is being drafted, it is a process of translating an idea or concept of the government that impacts society's rights, obligations, liabilities, behaviour or social framework into a concrete legal form. The line of authorities on what constitutes a legislation and legislative drafting are replete and can be observed in the following:

... the establishment in written form of rules for the regulation and control of future social conduct In particular, restraints are imposed on individuals and groups of

A persons and the exercise of various freedoms is regulated. On the other hand, important rights and benefits are conferred and protected ...

– Thornton's Legislative Drafting, Fifth Edition

Legislation is the framework by which government achieve their purposes. To
B politicians and administrators, legislation is a means to attain their economic, cultural, political and social policies ...

By legislation, policies are transformed into enforceable laws. The governments enact positive laws of a creative kind with the intention of bringing about a new condition, a new power, a new set of circumstances.

C

An Act of Parliament is enacted not, primarily, for those who enact it, it is enacted for the people in a given jurisdiction. It is a form of communication from those who govern to those who are governed.

– Legislative Drafting, VCRAC Crabbe

D

[90] When construing an Act of Parliament, it is the court's bounden duty to determine the legislative intent primarily by examining the words appearing in the particular Act.

E

[91] In this context, it is clearly stated in Act 809 that the purpose of the Act is to provide for the issue of a licence for the operation or promotion of pool betting and it further provides that the Minister may issue a licence to a person for the collection, operation or promotion of pool betting. This Act shall apply
F throughout Malaysia.

[92] On the other hand, Act 171 gives the power to the local authority to issue licences with prescribed fees. These charges are for the inspection or supervision of any trade, occupation or premises in respect of which the licence
G is granted. At this point, the court should attempt to reconcile the intention of the Parliament in enacting Act 809 by adopting a harmonious construction. The rule of widest construction does not permit the power that is given only to the local authority to issue a premise licence for gambling, to be interpreted so as to include matters with no rational connection to it or override or render the
H intention of Act 809 nugatory.

[93] The enacted laws must be complete. It must be capable of compliance and enforceable and understandable, as could be seen in the case of *Ketua Pengarah Hasil Dalam Negeri v Daya Leasing Sdn Bhd* [2005] 4 MLJ
I 138; [2005] 2 CLJ 449 (CA) that:

The courts strongly lean against a construction which reduces a statute to a futility. A statute must be so construed so as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pareat (that the thing

may rather have effect than be destroyed in order that the thing may be valid rather than invalid).

[94] It must cover all reasonably foreseeable circumstances likely to arise and ensure that all relevant provisions in each of the laws are necessary to give effect to the enforcement of the Act, in this case for the intention of Act 809 to be carried out, as held in the case of *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311 (FC) that:

> This court must give effect to every word used in a statute and determine the meaning which emanates from it since there is a presumption that Parliament does not legislate and in fact does nothing in vain.

[95] In the case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 (FC), it was held that;

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant It must be borne in mind that:
>
> > As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains, (Per Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at p 33).

[96] In conclusion, based upon the authorities and discussion above, the application for judicial review ought to be granted on the grounds of illegality and irrationality, for the following reasons:

(a) on the facts and circumstances of the present case, the court may interfere on the grounds of illegality and irrationality if the first respondent's decision is inconsistent with the Federal Constitution and in any manner irrational;

(b) the first respondent's decision to cease the renewal of premise licence for gambling is inconsistent with art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution. The matter in issue had been extended to the matter of local authority banning betting and lotteries under the subject matter of premise licence for gambling;

(c) this would then cause apparent conflict or overlap between the entry of item 4 of the State List and the entry of item 4(1) of the Federal List, where the court should attempt to reconcile them by adopting a harmonious construction. Undertaking the exercise of harmonious construction, it may only allow the matter of local authority in relation to

A the premise licence for gambling, but not to the extent of banning betting and lotteries. Otherwise, it would be including matter to override or render meaningless the entry in item 4(1) of the Federal List;

(d) as a result, the matter of local authority to ban betting and lotteries under the subject matter of premise licence for gambling has no rational connection to item 4 of the State List, instead it has the effect of overriding and rendering meaningless the entry of betting and lotteries in item 4(1) of the Federal List;

(e) the court is, therefore, duty bound to interfere as the first respondent's decision of the first respondent is inconsistent with the Federal Constitution, where the first respondent had acted illegally and/or ultra vires of its authority when it arrived and implemented the first respondent's decision and failed to understand, inter alia, that:

(i) pool betting and lotteries are matters in item 4(1) of the Federal List and not under the State List. Implementation of the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional for being inconsistent with art 80 read together with art 74 and item 4(1) of the Federal List of the Federal Constitution; and

(ii) the first respondent had erred in law in arriving at the decision in disregard of art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution that pool betting and lotteries are matters under Federal List and not State List.

(f) the first respondent had not directed himself properly in law taking into consideration the matters which he is bound to consider, whereby it had acted unreasonably and failed to take into account relevant consideration in reaching the first respondent's decision by failing to understand that betting and lotteries are matters within item 4(1) of the Federal List and not under the State List.

[97] As a consequence, the following reliefs ought to be granted to the applicants:

(a) a declaration that the first respondent had acted illegally and/or irrationally in:

(i) deciding pursuant to the first respondent's decision on 8 December 2021 to cease the renewal of all premise licences for the business of pool betting in the State of Kedah from 1 January 2023, and/or

(ii) causing the Municipal Councils to issue the municipal letters dated 3 January 2023 to inform the applicants that the premise licence for the business of pool betting of the applicants expiring on 18 February 2023 would be revoked.

(b) a declaration that the first respondent's decision is ultra vires the Federal Constitution and/or unconstitutional as it is inconsistent with and in breach of, inter alia, art 80 reading together with art 74 and item 4(1) of the Federal List of the Federal Constitution and is therefore null and void;

(c) an order for *certiorari* to move this honourable court to quash the first respondent's decision; and

(d) an order for damages to be assessed by the deputy registrar/senior assistant registrar for the loss of the applicants to be paid by the first respondent to the applicants.

Application allowed.

Reported by Muhamad Azham Marwan